APPEAL NO. 93511

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 20, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues at the CCH were: 1. whether the appellant (claimant herein) suffered an injury to his left knee during the course and scope of his employment with (employer herein) on (date of injury); 2. whether the claimant failed to timely report any such injury and; 3. whether the claimant suffered an injury to his left knee during the course and in the scope of his employment on (date of injury). The hearing officer found that the claimant did suffer an injury in the course and scope of his employment on (date of injury), that he did timely report this injury to his employer, and that on (date of injury), he did not suffer an injury during the course and scope of his employment, but did suffer an aggravation of his (date of injury), compensable injury.

Both the claimant and cross-appellant (carrier herein) filed requests for review. The claimant basically argues in his appeal that he does not believe he suffered two separate injuries but that both his falls were part of one injury and that he is entitled to income and medical benefits after (date of injury). The carrier argues in its appeal that the findings of the hearing officer that the claimant suffered an injury in the course and scope of his employment on (date of injury), and that the claimant timely notified the employer of this injury are not supported by sufficient evidence. The carrier also argues that the finding of the hearing officer that the fall of (date of injury), aggravated the compensable injury of (date of injury), is supported by no evidence.

DECISION

Finding no reversible error and the decision of the hearing officer supported by sufficient evidence, we affirm.

The claimant testified that he was injured in the course and scope of his employment while working for the employer on (date of injury). He stated that while carrying a fan blade weighing from 40 to 60 pounds, he slipped on water on the floor injuring his left knee. The claimant recounted that upon falling he called out and a coworker, (Mr. DLS), came over to help him get up. The claimant testified that he then told (Mr. M), a supervisor, that he had slipped, fallen and hurt himself. The claimant also testified that he went to (Mr. C), the employer's medical technician, who put an ace bandage on his left knee.

The claimant testified that he continued to have difficulty with his knee and weakness in his left leg after his fall. He stated that he did not go to a doctor because he thought these problems might be caused by the fact that his job required a great deal of standing. The claimant testified that on (date of injury), he was on his way to work, walking down stairs at home, when his left knee gave way and he slipped down the stairs. The claimant testified that he proceeded to work where he reported that he had fallen at home, and said he was advised to seek medical treatment, which he did.

According to the affidavit of Mr. C, the doctor's office to which the claimant went called the employer to seek authorization for treatment of the claimant under workers' compensation. The affidavit reflects that Mr. C told the doctor's office that the claimant was injured at home, but that he was informed by the doctor's office that the claimant felt that his fall at home was caused by his knee giving out due to an earlier reported fall at work which had injured the same knee. Mr. C stated in his affidavit that a check of company records showed no record of the earlier incident and he advised the doctor's office that the employer would not accept the claimant's injury as work related.

The carrier also submitted affidavits from (Mr. S), the employer's safety representative, and from Mr. M. Mr. S stated in his affidavit that at the request of Mr. C he spoke to the claimant on (date of injury). Mr. S related that the claimant told him that he had fallen at home that morning, but that he had originally slipped 3 or 4 months before at work. Mr. M stated in his affidavit that he was unaware of any injury to the claimant prior to (date of injury), and if he had been aware of any such injury, he would have conducted an accident investigation.

The claimant submitted an affidavit from Mr. DLS confirming that he witnessed the aftermath of the claimant's (date of injury), fall and medical records which showed that when the claimant first went to the doctor in July he had reported his fall in February in the history he gave the doctor. The carrier submitted various records apparently to indicate that it had no record of this February fall, prior to July 1992.

Carrier challenges the sufficiency of the evidence supporting the determinations of the hearing officer that the claimant was injured in the course and scope of his employment on (date of injury), and that he timely reported his injury to the employer. Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is

so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Under this standard of review we cannot set aside the challenged findings of the hearing officer. A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. Clearly in the present case the hearing officer chose to believe the testimony of the claimant that he was injured in the course and scope of his employment. The claimant's testimony in this regard was corroborated by the affidavit of Mr. DLS. While there was

some contrary evidence, it certainly did not constitute the great weight and preponderance of the evidence.

In Associated Employers Insurance Company v. Burris, 321 S.W.2d 112 (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.) the court held there was sufficient evidence to support a finding of timely notice where the claimant swore he told the foreman about his injury the day it occurred and the foreman swore he did not. *See also* Texas Workers' Compensation Commission Appeal No. 92095, decided April 27, 1992; Texas Workers' Compensation Commission Appeal No. 92102, decided April 24, 1992; Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992. In the present case the claimant testified that he reported the injury to a supervisor, Mr. M, and Mr. M swore in affidavit that the claimant did not. Resolution of this dispute is clearly the province of the hearing officer.

The carrier contends that there is no evidence to support the finding of the hearing officer that the claimant's (date of injury), fall at home aggravated his (date of injury), knee injury. In reviewing a no evidence point, we have held in accordance with Texas case authority that a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact and reject all evidence and inferences to the contrary. Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We should uphold the finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. In the present case the testimony of the claimant and the medical records he introduced, as well as reasonable inferences which could be drawn therefrom, constitute some evidence which supports the finding of the hearing officer, and we will not overturn it.

Claimant's appeal is apparently based more on a misunderstanding of the hearing officer's decision than a disagreement with it. The claimant apparently believes that the finding by the hearing officer that the (date of injury), fall aggravated his February 1992 compensable injury precludes him for recovery for any workers' compensation benefits after (date of injury). This is simply not the case. An injury in the course and scope of employment is compensable even if aggravated by a subsequent injury. Guzman v. Maryland Casualty Co., 107 S.W.2d 356 (Tex. 1937); Hardware Mutual Casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 93226, decided May 13, 1993. This is the reason that the hearing officer ordered the carrier to pay medical and income benefits to the claimant in accordance with his decision, the 1989 Act, and the rules of the Texas Workers' Compensation Commission.

Income benefits start to accrue on the eighth day after disability begins. Article 8308-4.22 (1989 Act). Disability means the inability to obtain and retain employment at

wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). If the carrier refuses to pay benefits for periods of disability, the claimant has a right to take the issue to the dispute resolution process by requesting a benefit review conference. *See* Article 8308-6.12.

In the present case, the hearing officer ruled in claimant's favor on all the issues before him. He did not rule on the issue of disability because it was not before him. The claimant, therefore, does not have grounds to appeal the hearing officer's decision, but has the right to continue to pursue his claim for benefits.

For the reasons discussed in examining both the appeals of the carrier and the claimant, the decision of the hearing officer is affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge